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August 20, 1993

RECEIVED

AUG 20 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Motion to Revoke Issues Against ASF."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
John W. Hunter

By: 
Stephen G. Yelverton

Enclosure

B:CATON.97

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AUG 20 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

To: Administrative Law Judge
Walter C. Miller

)
)
) MM Docket No. 93-107
)
)
) File Nos. EPH-911230MA
)
)
) through
)
) EPH-911231MB
)

MOTION TO ENLARGE ISSUES AGAINST ASF

Respectfully submitted,

MCRAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

August 20, 1993

B:CATON.97

MOTION TO ENLARGE ISSUES AGAINST ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.229 (b)(1) of the Commission's Rules, hereby submits this motion to enlarge the issues against ASF Broadcasting Corporation ("ASF"). This motion is based on the deposition testimony of Ardeth S. Frizzell, a shareholder of ASF, and is filed within fifteen (15) days of receipt of the deposition transcripts. Thus, it is timely filed. In support of its motion to enlarge the issues, ORA submits the following comments.

ASF proposes to operate its station by leasing the existing facilities of defunct Station WBBY-FM. That station operated at 3kw with an omnidirectional transmitter. In an amendment to its application, filed March 5, 1992, ASF proposes to operate at 5kw with a directional antenna (Dep. Tr. 74). See, FCC Form 301, Section V-B, pp. 15-16. However, Frizzell never considered the cost of a directional antenna in determining cost estimates for ASF and she does not know how much such an antenna would cost (Dep. Tr. 75). At the time of certification, Frizzell prepared no written budget or cost estimates (Dep. Tr. 72). A written budget prepared sometime after certification contains no reference to a directional antenna (Dep. Tr. 76). See, attachment 1.

ASF proposes to provide auxiliary power at both the studio and tower site (ASF Hearing Ex. 4). However, Frizzell did not include costs for auxiliary power in any estimates or budgets for ASF. She does not know if auxiliary power generators will be provided in the lease of the Station WBBY-FM facilities (Dep. Tr. 77).

ASF stated in its application, filed on December 30, 1991, that its cost estimates were \$90,000 (Dep. Tr. 31). See, FCC Form 301, Section III, p. 6. Attachment 2. Pursuant to a shareholders agreement, dated December 23, 1991, Section 3, pp. 3-4, the \$90,000 amount is to be funded solely by a \$100,000 loan from Thomas J. Beauvais, a purported non-voting shareholder. See, attachment 3.

Commission policy requires that an applicant prepare at the time of certification written documentation showing cost estimates for construction and the first three months of operation. See, Revision of FCC Form 301, 50 RR2d 381, 382 (1981); FCC Form 301 Instructions (1989-1992 version), Section III (D)(1)(b),

pages 5-6; Revision of FCC Form 301, 4 FCC Rcd 3853, 3859-3860, paras. 43, 46, 49, 52 (1989). As previously noted, ASF failed to prepare written cost estimates at the time of certification, or subsequently to prepare complete cost estimates.

Accordingly, the failure of ASF to prepare written cost estimates at the time of certification requires the specification of a financial qualifications issue. Las Americas Communications, Inc., 1 FCC Rcd 786, 788, para. 10 (Rev. Bd 1986), written documentation is the sine qua non for financial qualifications. Northampton Media Associates, 4 FCC Rcd 5517, 5519, paras. 18-19 (1989), all applications filed on or after June 26, 1989, must have written documentation of their financial qualifications prepared at the time of certification.

Moreover, the failure of ASF to include in its subsequently prepared estimates the costs of a directional antenna and auxiliary power generators requires the specification of a financial qualifications issue. Columbus Broadcasting Corp., 3 FCC Rcd 5480, 5481, para. 7 (MMB 1988), incomplete cost estimates raise financial qualifications issue; Dean F. Aubol, 6 FCC Rcd 4117, para. 3 (MMB 1991), where cost estimates would exceed the amount of available committed funds, a financial qualifications issue is raised; Victorson Group, Inc., 6 FCC Rcd 1697, 1700, para. 19 (Rev. Bd. 1991), vague "general sense" of total cost estimates is insufficient. Commission policy would not allow ASF to now change or revise its stated cost estimates without a showing of "good cause." Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991).

It is inconceivable that Frizzell, an experienced broadcaster (ASF Hearing Ex. 3, p. 2), would have inadvertently omitted such key items as a directional antenna and auxiliary power generators in the ASF cost estimates. Accordingly, a substantial and material question of fact is raised as to whether ASF knowingly and intentionally misrepresented its financial qualifications. See, FCC Form 301, 4 FCC Rcd 3853, supra.

The Presiding Judge is requested to specify the following issues:

(1) To determine whether ASF Broadcasting Corporation failed to prepare written cost estimates at the time of certification, whether it subsequently prepared incomplete cost estimates, whether it has available sufficient committed funds to cover its construction and first three months of operations, and whether it is financially qualified to be a Commission licensee, and thus whether its application should be granted?

(2) To determine whether ASF Broadcasting Corporation knowingly and intentionally misrepresented its financial qualifications in its December 30, 1991, application and, if so, whether it possesses the requisite character and basic qualifications to be a Commission licensee, and thus whether its application should be granted?

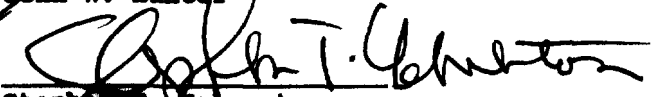
If these issues are specified, ORA requests that ASF produce any documents related to its cost estimates which have not already been produced. This would include notes or drafts relating to its cost estimates, records of telephone conversations and facsimile transmissions relating to preparation of its cost estimates, and documents relating to the sources of information for the costs included in its estimates.

WHEREFORE, in view of the foregoing, ORA requests that the foregoing issues be specified against ASF.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
John W. Hunter

By: 
Stephen T. Felverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th St., N.W., Suite 400
Washington, D.C. 20005
Telephone: 202-659-3900

August 20, 1993

020979.00001 ORA.70x

ASF BROADCASTING CORPORATION

COST OF OPERATIONS FOR FIRST 90 DAYS

PROJECTION:

Personnel	\$57,000
Travel & Entertainment	600
Advertising/Promotion	600
Repair and Maintenance	1,000
Supplies	600
Utilities	1,500
Freight/Postage	650
Insurance	1,000
Rents/Leases	
Equipment/Studio/Offices	18,000
Taxes	600
Professional Services	500
Dues and Subscriptions	450
Programming	5,250
Royalties	750
Miscellaneous	<u>1,500</u>
TOTAL COST OF OPERATIONS (90 Days)	\$90,000

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 90,000.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Ardeth S. Frizzell 164 S. Grener Road Columbus, OH 43228	(614) 878-8559	President, Treasurer & Secretary	\$12,000.00
Thomas J. Beauvais 2725 Lahser Road Southfield, Michigan 48034	(313) 353-4520	Non-voting	\$196,000

SHAREHOLDERS AGREEMENT

THIS SHAREHOLDERS AGREEMENT is entered into on December 23, 1991, among the following parties (hereinafter collectively referred to as the "Parties"): ARDETH S. FRIZZELL (hereinafter referred to as "ASF") and THOMAS J. BEAUVAIS (hereinafter referred to as "TJB").

WHEREAS:

A. ASF and TJB constitute all of the shareholders as ASF BROADCASTING CORPORATION, an Ohio Corporation (hereinafter referred to as the "Company"). ASF is the holder of Two Hundred and Fifty (250) shares of Voting Common stock of the Company and TJB is the holder of Seven Hundred and Fifty (750) shares of Non-Voting Common Stock of the Company; and

B. No other shares of stock of the Company have been authorized, issued or are outstanding; and

C. The Company desires and intends to submit an application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio; and

D. By this Agreement, the parties intend to establish and set forth further understandings between them concerning future capital contributions and loans by the shareholders to the Company, voting rights, management, and ASF'S option to purchase in accordance with the provisions hereinafter set forth;

NOW THEREFORE, it is agreed as follows:

1. **Governing Law.** This Agreement and the Corporation subject to this Agreement shall be governed under and in accordance with Ohio Revised Code Section

P. 2

	<u>Capital Stock</u> <u>\$1.00 Par Value</u>	<u>Additional Paid</u> <u>in Capital</u>
250 Voting Common	\$250.00	\$1,750.00
750 Non-voting Common	\$750.00	\$5,250.00

PRIOR TO GRANT OF CONSTRUCTION PERMIT

In addition to the Additional Paid In Capital referred to hereinabove, ASF and TJB agree to provide further Additional Paid In Capital in the same proportion as their respective Capital Stock Accounts up to Forty Thousand (\$40,000) Dollars total. In addition to the above, TJB further agrees to provide Additional Paid In Capital up to Sixty Thousand (\$60,000) Dollars. The Additional Paid In Capital, first from ASF and TJB jointly, and after, by TJB, are to be paid to the Company within thirty (30) days after receipt of a request for said Additional Paid In Capital from the President of the Company. The proceeds thereof shall be used for the following purposes only:

Legal, engineering, or other reasonable expenses related to the Company's application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio on Channel 280.

AFTER GRANT OF CONSTRUCTION PERMIT

After issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280, and upon which no further appeals can be taken, TJB agrees to loan to the Company additional amounts, up to One Hundred Thousand (\$100,000) Dollars, on a first secured basis at an interest rate of prime plus three (3%) percent (prime to be determined by the then current published rate of Bank One of Columbus, N.A.)

with maturity of five (5) to seven (7) years and with interest and principal payment provisions to be determined at the time the loan(s) is (are) closed. The loan proceeds shall be used for the following purposes only:

(a) Lease costs necessary for leasing of the Company's radio broadcast facility in or near Westerville, Ohio after issuance of the Federal Communications Commission of a construction permit to the Company for FM radio service licensed to Westerville, Ohio on Channel 280.

(b) Three (3) month's additional working capital as required by the Federal Communications Commission license application.

4. Option to Purchase. ASF shall have an option to purchase all of TJB's Capital Stock (consisting of Seven Hundred Fifty (750) shares of Non-Voting Common Stock) on the following terms and conditions, provided however, that all outstanding loans from TJB to the Company are paid in full prior to exercise of the option.

(a) Payment. In cash at closing.

(b) Option Time Period. Any time during the first three (3) years after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken. This option may be exercised by written notice as provided herein.

(c) Option Price. During the first year after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken, the option price shall be five (5) times to the total of TJB'S Capital Stock and Additional Paid In Capital accounts. During the second year

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

-----X	
IN RE: APPLICATIONS OF	: MM DOCKET NUMBER
	: 93-107
	: FILE NUMBER
DAVID A. RINGER	: BPH-911230 MA
	:
ASF BROADCASTING CORPORATION	: BPH-911230 MB
	:
WILBURN INDUSTRIES, INC.	: BPH-911230 MC
	:
SHELLEE F. DAVIS	: BPH-911231 MA
	:
WESTERVILLE BROADCASTING	:
COMPANY LIMITED PARTNERSHIP	: BPH-911231 MB
	:
OHIO RADIO ASSOCIATES, INC.	: BPH-911231 MC
	:
FOR A NEW CONSTRUCTION PERMIT	:
A NEW FM STATION ON CHANNEL	:
280A AT WESTERVILLE, OHIO	:
-----X	

DEPOSITION OF ARDETH S. FRIZZELL

Washington, D. C.

Tuesday, July 13, 1993

Deposition of ARDETH S. FRIZZELL, called for examination pursuant to notice of deposition, at the law offices of Baraff, Koerner, Olender & Hochberg, P. C., 5335 Wisconsin Avenue, N.W., at 10:20 a.m. before COLLEEN R. O'CONNELL, a Notary Public within and for the District of Columbia, when were present on behalf of the respective parties:

-- continued --

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1 A After it was granted.

2 Q And below that, it says you're committed to pay
3 \$12,000 and Mr. Beauvais is committed to pay \$196,000.
4 Where did those numbers come from?

5 A After figuring it all up with the initial -- the
6 capital, stock and all of the money, that's what it came
7 to for the whole period.

8 Q So you have a little over \$200,000 to be
9 invested to meet costs of \$90,000. Is that how you
10 calculated it out?

11 A The 90,000 is to run it for the three-month
12 period after it was granted, and the rest of it is
13 obtaining and getting the license.

14 Q But you yourself are the one who calculated
15 those figures and put them in?

16 A (No verbal response.)

17 Q You have to say yes.

18 A Yes.

19 Q Did you talk to anyone about those figures that
20 needed to be included before you put them in?

21 A With JoAnne.

22 Q There's another exhibit to the application

1 items?

2 A It's a -- I think so, yes.

3 Q Is that budget in writing anywhere?

4 A No.

5 Q Have you -- how did you come up with that figure?

6 A It is based on talking with JoAnne and her
7 application and just seeing what had -- the 90, what I
8 figured in my head and on paper which has been thrown away
9 how much it would cost to run it for three months.

10 Q Okay. Now, you mention saying that it's been
11 thrown away. What was that that you say was thrown away?

12 A Scratching, you know, when you're adding, you
13 know, figuring out a budget and then you toss it.

14 Q Okay. Well, there is a budget that, I guess,
15 has been provided here, to be perfectly fair to you. What
16 is -- I'm placing a document before the witness to refresh
17 her memory.

18 Are you familiar with that document that's
19 entitled "ASF Broadcasting forecasts of operating for
20 first 90 days, projection," and it has a total cost of
21 operation of \$90,000?

22 A Yes, that's the operation budget.

1 Q Now, they operated with what, a 3-kilowatt
2 operation; is that correct?

3 A Yes.

4 Q And it was what is called an omnidirectional
5 antenna pattern?

6 A I don't know.

7 Q It was circular, is that your understanding?

8 A I don't know.

9 Q Now, you mentioned that you're going to be going
10 up -- that your proposal is for a 6-kilowatt operation, in
11 certain respects; is that correct?

12 A Yes.

13 Q And it's a directional antenna?

14 A Uh-huh.

15 Q And is it your understanding that -- what is your
16 understanding concerning whether or not the equipment that
17 was owned by WBBY Mid-Ohio, whether they owned a
18 directional antenna?

19 A I don't believe they did.

20 Q Okay.

21 A But I -- I don't believe. I'm not positive. I
22 wouldn't swear to that.

1 Q But it's your -- you're working under the belief
2 or understanding that they do not own such an antenna; is
3 that correct?

4 A Correct.

5 Q But you proposed to use a directional antenna;
6 is that correct?

7 A Correct.

8 Q Now, you would have to, I suppose, purchase that
9 antenna; is that correct?

10 A Yes.

11 Q Is there -- has there been an estimate made by
12 you concerning how much such an antenna would cost?

13 A No.

14 Q Do you have any idea how much such an antenna
15 would cost?

16 A No.

17 Q Would it be fair to say that it is not included
18 on your budget for construction or operation of the
19 station?

20 A I believe it would be in there.

21 Q Okay. Well, let me place a copy of your
22 cost-of-operations budget before you. Under what entry is

- 1 it under?
- 2 A It's not on that.
- 3 Q Excuse me?
- 4 A It's not on there.
- 5 Q Okay. Is it on any other budgetary estimate
- 6 that you've made?
- 7 A No.
- 8 Q Is it not; is that correct?
- 9 A Right.
- 10 Q Okay. Did WBBY operate with the capability for
- 11 auxiliary power, generation equipment?
- 12 A They had a generator, yes.
- 13 Q Okay. Was that at the main studio?
- 14 A Yes, it was.
- 15 Q Okay. So when the power went off globally
- 16 within the neighborhood, you're saying that WBBY had the
- 17 capability of remaining on the air?
- 18 A We, yes, we did.
- 19 Q And they had such an emergency generating
- 20 equipment capability at its transmitter site?
- 21 A I don't know.
- 22 Q In light of that, do you know if the equipment

1 that would be supplied by WBBY or Mid-Ohio, whether it
2 will include an emergency generating capability -- or
3 emergency generator for the transmitter site as part of
4 the equipment that it will supply to you?

5 A I don't know.

6 Q Have you budgeted such a figure -- such an item
7 in your items for construction or operation of the
8 station?

9 A No, I have not.

10 Q Okay. Thank you.

11 MR. ALPERT: Do you have a copy that you can
12 provide to the witness of her, I think it's articles, says
13 "Code of Regulations of ASF Broadcasting Corporation"?

14 MR. KOERNER: Yes.

15 BY MR. ALPERT:

16 Q Okay, Ms. Frizzell, before you right now is a
17 document entitled "Code of Regulations of ASF Broadcasting
18 Corporation"; is that correct?

19 A Yes.

20 Q Okay. It says here that "The annual meeting of
21 the shareholders will be held on the second Tuesday in
22 March at 11:00 a.m. in each year" in article 2, section 1

CERTIFICATE OF NOTARY PUBLIC & REPORTER

104

I, COLLEEN R. O'CONNELL, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Colleen R. O'Connell
Notary Public in and for the
District of Columbia

My Commission Expires FEBRUARY 28, 1998

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McHair & Sanford, P.A., do hereby certify that on this 20th day of August, 1993, I have caused to be hand delivered a copy of the foregoing "Motion to Enlarge Issues Against ASF" to the following:

The Honorable Walter C. Miller
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

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Hearing Branch
Federal Communications Commission
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1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery